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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 A.G., a minor, by and through his
12 Guardian ad litem, M.G., a minor, by and
13 through his Guardian ad litem,
14 Plaintiffs,
15 v.
16 County of San Diego, et al.,
17 Defendants.

Case No.: 16-cv-2290-AJB-KSC

**ORDER:
DENYING PLAINTIFFS' MOTION
TO DISQUALIFY COUNTY
COUNSEL (Doc. No. 39), and
GRANTING PLAINTIFFS' MOTION
FOR RECONSIDERATION (Doc. No.
57)**

18 Plaintiffs move the Court to disqualify County Counsel from representing
19 defendants. Plaintiffs argue County Counsel is abusing its relationship with the County by
20 indirectly, and without approval, contacting plaintiffs, as well as by improperly accessing
21 privileged juvenile case files. After analyzing the moving papers and hearing argument
22 from the parties, the Court **DENIES** plaintiffs' motion. (Doc. No. 39.)

23 **I. BACKGROUND**

24 Plaintiffs bring claims against the County and others for alleged abuses they suffered
25 at the hands of defendants while they were in foster care. While the details of plaintiffs'
26 case are tragic, the Court will only reference facts pertinent to the instant motion. A.G. and
27 M.G. were, for periods of time in their childhoods, wards of the County's foster care
28 program. Eventually, A.G. was adopted by a foster parent who was later convicted for

1 sexually abusing both A.G. and M.G. Because of plaintiffs' history with the County, San
2 Diego County Health and Human Services Agency, among other agencies, possess records
3 detailing plaintiffs' history with the system from a very young age until present. Plaintiffs
4 maintain these files are confidential. Additionally, A.G. is currently enrolled in a County
5 program as an adult and regularly meets with a social worker, who creates detailed logs of
6 the discussions between the two. Those logs, and plaintiffs' HHSA juvenile case files, form
7 the basis of plaintiffs' disqualification motion.

8 **II. LEGAL STANDARDS**

9 The disqualification of counsel because of an ethical violation is a discretionary
10 exercise of the trial court's inherent powers. *See United States v. Wunsch*, 84 F.3d 1110,
11 1114 (9th Cir. 1996); *see also Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100,
12 1103–04 (N.D. Cal. 2003). However, disqualification is a drastic measure that is
13 disfavored. *Visa U.S.A., Inc.*, 241 F. Supp. 2d at 1104. Because they are often tactically
14 motivated, motions to disqualify “should be subjected to particular judicial scrutiny.” *Optyl*
15 *Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (internal
16 citations omitted). However, “the paramount concern must be the preservation of public
17 trust both in the scrupulous administration of justice and in the integrity of the bar.” *State*
18 *Farm Mut. Auto. Ins. Co. v. Federal Ins.*, 72 Cal. App. 4th 1422, 1428 (1999). Motions to
19 disqualify counsel are governed by state law. *See W. Sugar Coop. v. Archer-Daniels-*
20 *Midland Co.*, 98 F. Supp. 3d 1074, 1080 (C.D. Cal. 2015) (citing *Rodriguez v. W. Publ’g*
21 *Corp.*, 563 F.3d 948, 967 (9th Cir. 2009)); *see also* Civil Local Rule 83.4(b).

22 **III. DISCUSSION**

23 Plaintiffs argue County Counsel should be disqualified because: (1) it has engaged
24 in indirect communications with plaintiffs; and (2) it improperly accessed unredacted
25 juvenile case files. (Doc. No. 39-1 at 8, 11.) Defendants counter, arguing: (1) plaintiffs'
26 delay in bringing the motion waived their right to disqualify counsel; (2) that A.G. waived
27 any attorney-client privilege when choosing to speak about the case with his social worker;
28 and (3) that any prejudice suffered was cured when A.G. was assigned a new social worker

1 who was directed not to discuss the case. (Doc. No. 45 at 5.)

2 **A. The Timeliness of Plaintiffs' Motion**

3 As a threshold matter, the County argues that plaintiffs' motion was untimely filed,
4 thus waiving plaintiffs' rights to raise this issue. (Doc. No. 45 at 11.) Plaintiffs' counsel
5 learned of the improper communication with plaintiffs and County Counsel's access to
6 plaintiffs' records on January 17, 2018, but did not file this motion until March 22, 2018.
7 (*Id.* at 11–12.)

8 “California cases provide a disqualification motion can be waived if not timely
9 filed.” *City and Cnty of S.F. v. Cobra Solutions, Inc.*, 232 Cal. App. 4th 468, 473 (2014).
10 “[T]he delay has to be extreme or unreasonable before it operates as a waiver.” *Id.*
11 (internal citations omitted). The burden is on the moving party to show “unreasonable delay
12 causing prejudice.” *Id.* The few cases the County relies on to support their argument are
13 unpersuasive. One Court found a two-year delay was unreasonable. *Liberty Nat.*
14 *Enterprises, L.P. v. Chicago Title Ins. Co.*, 194 Cal. App. 4th 839, 847–49 (2011). Another
15 found an 18-month delay in filing the disqualification motion 32 days before trial was
16 unreasonable. *Cox v. Am. Cast Iron Pipe Co.*, 847 F.2d 725, 731 (11th Cir. 1988). And
17 finally, one court held that failing to request disqualification during trial—after the
18 disqualifying incident arose—constituted waiver. *Kafka v. Truck Ins. Exchange*, 19 F.3d
19 383, 386 (7th Cir. 1994). In *Cobra*, the Court found a delay of five years was unreasonable
20 and thus constituted waiver.

21 Here, plaintiffs waited a mere two months before filing this motion—not an
22 unreasonable amount of time for plaintiffs' counsel to investigate the facts, confer with
23 plaintiffs, and draft the instant motion. More importantly, the County failed to carry its
24 burden showing how the two-month delay was indeed unreasonable (like the five-year
25 delay was in *Cobra*), or how the County was prejudiced. Thus, the court finds plaintiffs
26 did not waive their right to file this motion.

27 **B. The County Counsel's Indirect Communications with Plaintiffs**

28 Plaintiffs allege that County Counsel is attempting to have unauthorized

1 communication with plaintiffs through its interaction with social workers. The
2 complication arises particularly with A.G. because he is still “under the jurisdiction of the
3 juvenile court” after he was arrested and detained in juvenile hall. (Doc. No. 45 at 7.) A.G.
4 meets monthly with a social worker or his probation officer, whose objectives include
5 helping maintain a positive, stable relationship between the social worker and child and
6 engaging the child in his future plans. (*Id.* (citing DSS Regulations 31-320.57, 31-320.58).)

7 Specifically, plaintiffs argue that County Counsel violated California Rule of
8 Professional Conduct 2-100, which forbids a direct or indirect communication about the
9 subject of the representation when the attorney knows the person is already represented.
10 The alleged indirect communication occurred when A.G. met with a social worker, who
11 discussed not only the case with A.G., but also discussed a confidential attorney-client
12 communication between A.G. and his counsel, and gave A.G. advice on the County’s
13 settlement offer “that directly conflicted with Plaintiff Counsel’s recommendations.”
14 (Doc. No. 39-1 at 9.) The communication was initiated by A.G., however, the social worker
15 allowed it to continue. The social worker “drafted a report” regarding the meeting and
16 “documented the issues that were discussed.” (*Id.*) County Counsel, then, read the social
17 worker’s “*unredacted* contract notes,” which contained the “*confidential* attorney-client
18 communication.” (*Id.* (emphasis in original).) County Counsel also met with the social
19 worker to discuss the meeting and the confidential communications. (*Id.* at 10.)

20 The Court agrees that this type of communication between the social worker, A.G.,
21 and County Counsel should never have happened and was improper. However, upon
22 reviewing *in camera* both the attorney-client letter that was discussed and the social
23 worker’s logs, the Court finds the error was not prejudicial to plaintiffs. First and foremost,
24 the Court notes County Counsel learned of the social worker’s communication with A.G.
25 regarding the privileged letter inadvertently by no fault of her own. Once she learned of it,
26 she immediately notified plaintiffs’ counsel to disclose the mistake. Moreover, the content
27 of the confidential letter, which has never been seen by Defense counsel, was relatively
28 benign and did not reveal any complexities of the case or litigation strategy that would be

1 overtly prejudicial to plaintiffs. Finally, the social worker involved was immediately
2 removed from A.G.’s case, and the new social worker was instructed not to discuss the
3 lawsuit with him.

4 The purpose of disqualification when an event like this arises “is not to punish a
5 transgression of professional ethics,” but to allow a remedy “where the misconduct will
6 have a ‘continuing effect’ on judicial proceedings.” *Baugh v. Garl*, 137 Cal. App. 4th 737,
7 744 (2006). The Court finds the inadvertent disclosure by the social worker to County
8 Counsel will not have a “continuing effect” on the case and did not prejudice plaintiff in a
9 way that warrants disqualification.

10 **C. The County Counsel’s Access to Plaintiffs’ Records**

11 Plaintiffs allege that County Counsel improperly accessed A.G.’s and M.G.’s
12 unredacted juvenile case files—and continues to do so. (Doc. No. 39-1 at 11.) According
13 to plaintiffs, County Counsel has two divisions: Civil Litigation County Counsel and a
14 separate Juvenile Dependency Division, which represents the Health and Human Services
15 Agency in juvenile dependency actions. (*Id.*) California’s Welfare and Institutions Code
16 § 827 sets forth the parties who may inspect a juvenile ward’s case file and County Counsel
17 is included when “representing the petitioning agency in a dependency action.” Cal. Welf.
18 & Inst. Code § 827(a)(1)(F). Those without exemption must seek a court order from
19 Juvenile Court to access the files. Plaintiffs maintain that County Counsel in this case—
20 from the litigation section—are not included in that rule, and thus Counsel was required to
21 obtain court approval before inspecting the records. (Doc. No. 39-1 at 11–12.)

22 However, County Counsel argues the distinction is not so clear. According to County
23 Counsel, while there are two divisions, it would be impossible to prevent certain attorneys
24 from seeing case files while also advising the client—the County. After hearing County
25 Counsel’s oral argument, the Court is convinced it—at this point—cannot prevent County
26 Counsel from accessing its own client’s records. Moreover, the Court finds the argument
27 now moot. To date, all records have been produced by the juvenile court judge and will be
28 turned over to plaintiffs after mandatory redaction—meaning County Counsel and

1 plaintiffs' counsel will be on equal footing regarding access to plaintiffs' records. While
2 plaintiffs expressed concern that County Counsel is the body redacting plaintiffs' records—
3 thus granting them unfettered access to files that plaintiffs' counsel themselves do not
4 have—the Court finds this process does not prejudice plaintiffs for several reasons. First,
5 should plaintiffs feel the County is unduly redacting A.G.'s or M.G.'s files, plaintiffs could
6 request the Court to review such redactions *in camera*. Next, the Court reminds the parties
7 of their Rule 26 disclosure requirements: County Counsel has a duty to disclose evidence
8 it intends to use at trial, and has a continuing duty to supplement any discovery it has
9 already disclosed. Fed. R. Civ. P. 26(a)(3), (e). This should ease any concerns plaintiffs
10 may have regarding unfair litigation or trial strategy—there are no surprises in federal court
11 and County Counsel would not be permitted to use previously-redacted information against
12 plaintiffs in trial without disclosing that information to plaintiffs first.

13 Plaintiffs—moving beyond § 827—also argue that juvenile records are not
14 accessible absent a court order, citing to a Ninth Circuit case for support. *Gonzalez v.*
15 *Spencer*, 336 F.3d 882 (9th Cir. 2003) (abrogated on other grounds by *Filarsky v. Delia*,
16 566 U.S. 337 (2012)). However, *Gonzalez* may not bear the weight plaintiffs need it to. *See*
17 *Ismail v. Fulkerson*, No. SA CV 10-00901-VBF, 2014 WL 3962488, at *11
18 (C.D. Cal. Aug. 12, 2014) (“*Gonzalez* did not address or definitively determine the
19 existence or scope of any constitutional informational privacy right, and . . . has very
20 limited precedential value.”); *see also Rigsby v. Cnty. of Los Angeles*, 531 F. App’x 811,
21 812 (9th Cir. 2013) (*Gonzalez* did not clearly establish privacy rights as to access of records
22 by social workers or disclosure of records to third parties). Alone, *Gonzalez* does not give
23 juvenile records absolute privacy rights. However, whether County Counsel’s accessing of
24 A.G’s files violates any constitutional right to privacy is not a question before the Court
25 today, and thus the Court finds the issue is not ripe to rule on. County Counsel has not been
26 sued in concert with these specific allegations, and the Court cannot give plaintiffs legal
27 advice or issue advisory opinions on constitutional issues.

28 Finally, the Court is eased by the fact that there is no proof in this case that County

1 Counsel was ruffling through plaintiffs' case files haphazardly. In other words, it does not
2 appear that County Counsel is peeking at A.G.'s and M.G.'s files willy-nilly to gain a
3 litigation advantage. Should plaintiffs discover evidence that County Counsel is, somehow,
4 abusing its privilege of access to these records, plaintiffs are free to file another
5 disqualification motion.


6 **D. Plaintiffs' Reconsideration Motion**

7 At the hearing, the Court ordered both parties to exchange confidential documents
8 that neither had yet seen. The Court ordered County Counsel to give plaintiffs a copy of
9 the social worker's report, and ordered plaintiffs to give County Counsel a copy of the
10 confidential client letter which was shared with the social worker. Plaintiffs filed an ex
11 parte reconsideration motion, requesting the Court reverse its order that plaintiffs exchange
12 its confidential client letter. (Doc. No. 57.) County Counsel orally represented to the Court
13 it did not wish to oppose plaintiffs' motion. For that reason alone, the Court **GRANTS**
14 plaintiffs' motion. Plaintiffs are no longer required to exchange the letter with County
15 Counsel.

16 **IV. CONCLUSION**

17 Although plaintiffs have legitimate concerns, and County Counsel's actions appear
18 disconcerting, the Court finds County Counsel's efforts to minimize prejudice to plaintiffs
19 were sufficient and do not merit the harsh remedy of disqualification. Thus, the Court
20 **DENIES** plaintiffs' motion to disqualify County Counsel. (Doc. No. 39.) Additionally, for
21 the reasons stated above, the Court **GRANTS** plaintiffs' motion for reconsideration.
22 (Doc. No. 57.) Finally, because discovery was stayed pending the outcome of the
23 disqualification motion, the Court **ORDERS** the parties to jointly contact Judge
24 Crawford's chambers within 3 days of this order to set a status conference.

25 Dated: June 8, 2018

26 
27 Hon. Anthony J. Battaglia
28 United States District Judge